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No. 04-989

IN THE

Supreme Court of the United States

SARAH JENKINS HORTON *et al.*,

Petitioners,

v.

BANK ONE, N.A., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

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February 16, 2005

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QUESTION PRESENTED

Whether the Fifth Circuit was correct when it held—in agreement with the Seventh and Ninth Circuits, but in clear conflict with the Second and Fourth Circuits—that a national bank is a citizen (for purposes of diversity jurisdiction) of the State of its principal place of business and the State listed in its articles of association.

PARTIES TO THE PROCEEDINGS

In addition to Sarah Jenkins Horton, George L. Matassarin was Plaintiff/Counter-Defendant/Appellant below, and is Petitioner here.

In addition to Bank One, N.A., Bank One Corporation and Bank One Wisconsin were Defendants/Counter-Plaintiffs/Appellees below, and are Respondents here.

RULE 29.6 STATEMENT

Bank One Wisconsin was a Wisconsin state charter bank. It had been merged into Bank One, N.A. by the time of this lawsuit.

Bank One, N.A. was a national banking association, whose 100% parent was Bank One Corporation. Its successor by merger is JPMorgan Chase Bank, N.A., whose 100% parent is JPMorgan Chase & Co.

Bank One Corporation was a bank holding company. Its successor by merger is JPMorgan Chase & Co.

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BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

Respondents Bank One, N.A., Bank One Corporation and Bank One Wisconsin (collectively, "Bank One") herein respond to the Petition for a Writ of Certiorari, and agree that certiorari should be granted to resolve the critical issue presented, which involves a fundamental jurisdictional question of national importance.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The decision of the court of appeals is published at 387 F.3d 426 (5th Cir. 2004), and is reproduced in the Appendix to the Petition ("Pet. App.") at 1a-19a. The decision of the district court is unpublished, and is reproduced at Pet. Supp. App. 20a-27a.

JURISDICTION

The decision of the court of appeals was entered on October 5, 2004. Pet. App. 1a. The court of appeals denied rehearing and rehearing en banc on November 18, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY OR OTHER LEGAL PROVISIONS

28 U.S.C. § 1332 provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States ....

28 U.S.C. § 1348 provides:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.
>
> All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

INTRODUCTION

Bank One agrees that the Petition should be granted. Although Bank One prevailed below and believes that the decision of the Fifth Circuit was correct, the Petition presents an

issue of national importance upon which the federal circuit courts are unquestionably divided. Moreover, the issue is a recurring one and the Court will have the benefit of scholarly lower-court opinions on both sides to guide its resolution of the issue. This Court's review is necessary to prevent the uncertainty, lack of uniformity and forum-shopping that will otherwise result.

The precise issue presented is how to determine the citizenship of a national bank for purposes of diversity jurisdiction. Three circuits (the Fifth, in the decision below, and the Seventh and Ninth) have concluded that a State is "located in" (and therefore a citizen of) two States—*viz.*, the State of its principal place of business, and/or the State listed on its organization certificate. Two other circuits (the Second and the Fourth) have reached a directly contrary result, holding that a bank is "located" in every State where it has a branch office and is, therefore, potentially a citizen of every single State. The Eleventh Circuit has indicated that it would follow this latter path as well. This clear and acknowledged division of authority amply justifies certiorari.

Furthermore, the issue presented concerns the scope of federal jurisdiction and thus involves basic questions of federalism that reinforce the importance of this Court's review. This Court repeatedly has granted certiorari to address important issues of federal jurisdiction, and it is undisputed that this case presents such a question. Section 1348 determines jurisdiction in every case in which a national bank is a party. And, no matter what the proper analysis of § 1348, some substantial portion of the federal judiciary is committing an intolerable error. Either some courts are improperly refusing to exercise jurisdiction, which they have an unflagging obligation to do, or other courts are improperly exercising jurisdiction that they do not have, which is equally forbidden. Either way, this Court should grant certiorari to resolve this frequently recurring issue of national importance.

STATEMENT

The facts of this case are significant only because they are so very commonplace and, as such, demonstrate the far-reaching implications of the question presented.

In 2002, Petitioner Horton (a citizen of Texas) brought suit against Bank One in Texas state court, in which she alleged state-law claims arising out of a dispute concerning a car loan. Pet. App. 2a. Bank One, for which Illinois is both the principal place of business and also the State listed on its organization certificate, *id.* at 3a, removed the case to federal district court based on diversity of citizenship, *id.* at 2a. Horton sought to remand the case to state court. She contended that, because Bank One has branches in Texas, it is "located" in that State for purposes of 28 U.S.C. § 1348, the parties are non-diverse, and federal jurisdiction is therefore lacking. Pet. App. 2a. The district court concluded that the parties were diverse, and denied Horton's motion. *Id.*

The Fifth Circuit affirmed. Pet. App. 2a. Relying upon the Seventh Circuit's 2001 decision in *Firstar Bank, N.A.* v. *Faul*, 253 F.3d 982 (7th Cir. 2001), the court "analyzed the text, history, and purpose of section 1348 and its predecessors," Pet. App. 4a, and concluded that "a national bank is not 'located' in, and thus not a citizen of, every state in which it has a branch," *id.* at 5a. Because it concluded that the term "located" is ambiguous, *id.*, the court looked to the history of § 1348's predecessor statutes, *id.* at 6a-9a. It reasoned that Congress's longstanding goal of ensuring "equal access to the federal courts for national banks, state banks, and corporations," *id.* at 8a, "is best served by interpreting 'located' as referring to a national bank's principal place of business [and] the state specified in the bank's articles of association," *id.* at 9a.

After rejecting Horton's interpretation of this history, Pet. App. 10a-13a, the court went on to address a series of other interpretive arguments. It concluded that this Court's deci-

sion in *Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977)—which interpreted a venue provision that employs the term "located"—does not resolve the jurisdictional question. Pet. App. 14a-15a. It determined, furthermore, that no implication could be drawn from the separate use of the terms "established" and "located" in § 1348. *Id.* at 16a-17a. Rejecting Horton's argument that different words must invariably have different meanings, the court properly recognized that for historical reasons, those terms had the same meaning in this context at the time the original statute was enacted. *Id.* In the end, the court of appeals concluded simply that "the definition of 'located' is limited to the national bank's principal place of business and the state listed in its organization certificate and its articles of association." *Id.* at 19a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND ACKNOWLEDGED CIRCUIT SPLIT OVER THE MEANING OF 28 U.S.C. § 1348, AND THE ISSUE IS RIPE FOR REVIEW.

1. There can be no question, as both Horton and Bank One agree, that there is a deep and recognized split among the federal circuit courts concerning the proper interpretation of the term "located" in 28 U.S.C. § 1348, which governs the citizenship of national banks for purposes of federal diversity jurisdiction. See *id.*; *id.* § 1332.

The Fifth Circuit, in the decision below, followed the Seventh Circuit in holding that a national bank is "located" only within "'the state of its principal place of business and the state listed in its organization certificate.'" Pet. App 4a; *Firstar*, 253 F.3d at 994. The Ninth Circuit has similarly interpreted a precursor to § 1348 as establishing the citizenship of national banks in "those states in which their principal places of business are maintained," not "upon the basis of branch

business offices." *American Sur. Co.* v. *Bank of Cal.*, 133 F.2d 160, 162 (9th Cir. 1943); see also *United States Nat'l Bank* v. *Hill*, 434 F.2d 1019, 1020 (9th Cir. 1970) (per curiam) (reaffirming *American Surety Co.*). And the Office of the Comptroller of the Currency repeatedly has adopted this same position, both in an opinion letter, *see* Office of the Comptroller of the Currency, Interpretive Letter No. 952 (Oct. 23, 2002), *available at* 2002 WL 32072482, at *4, and in briefs filed in the Fourth, Fifth and Seventh Circuits.[1]

By contrast, a divided panel of the Fourth Circuit concluded that "'located' should be construed to render banking associations citizens of the states in which they operate branch offices." *Wachovia Bank, Nat'l Ass'n* v. *Schmidt*, 388 F.3d 414, 416 (4th Cir. 2004), *reh'g & reh'g en banc denied*, No. 03-2061 (4th Cir. Jan. 28, 2005). The Second Circuit adopted the same interpretation of § 1348 in *World Trade Center Properties, L.L.C.* v. *Hartford Fire Insurance Co.*, 345 F.3d 154, 161 (2d Cir. 2003) ("Defendant ... is a national bank ... and by statute is deemed to be a citizen of every state in which it has offices."), and the Eleventh Circuit has indicated that it would adopt the same rule (although it later vacated its judgment when the case settled), see *In re First Nat'l Bank of Boston*, 70 F.3d 1184, 1188 n.3 (11th Cir. 1995), *vacated on other grounds*, 102 F.3d 1577 (11th Cir. 1996).

Not only is this conflict mature, but the comprehensive analyses undertaken by the Fourth, Fifth and Seventh Circuits demonstrate that there is nothing to be gained by waiting further. Those decisions, authored by three eminent jurists (Judges Flaum, Higginbotham and Luttig) are exhaustive and they consider—and disagree about—the significance of every

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[1] The Court not infrequently invites the Solicitor General to provide the views of the United States at the certiorari stage when a federal agency clearly has an interest in a case. Here, however, the views of the Office of the Comptroller of the Currency on the question presented are known, and the Solicitor General undoubtedly will present the government's views on the merits.

tool that the Court will use to interpret § 1348. For instance, the Fifth and Seventh Circuits have concluded that the term "located" has no "plain meaning," whereas the Fourth Circuit determined that the term "located" does have a plain meaning that definitively supports its interpretation of the term. Compare Pet. App. 5a, and *Firstar*, 253 F.3d at 987, with *Wachovia*, 388 F.3d at 416-18. The Fifth and Seventh Circuits determined that earlier statutes established a "settled meaning" of the term "located" that was ratified by the 1948 enactment of § 1348; the Fourth Circuit reviewed the same history and reached the opposite conclusion. Compare Pet. App. 6a-10a, and *Firstar*, 253 F.3d at 988-89, with *Wachovia*, 388 F.3d at 425-31.

These courts have likewise divided—and again, expressly so—over the relevance of *other* statutes that employ the term "located" in interpreting § 1348. Compare Pet. App. 14a-16a, 18a-19a, and *Firstar*, 253 F.3d at 989-91, with *Wachovia*, 388 F.3d at 418-25. In the course of analyzing this one aspect of § 1348, the courts further disagreed over the applicability of the rule of *in pari materia*, the relevance of this Court's decision in *Bougas*, and the significance of a 1982 amendment to the venue statute. Next, the decisions conflict as to whether it is necessary (as a matter of statutory construction, informed by the history of the banking industry) to accord different meanings to the different terms "established" and "located" in § 1348. Compare Pet. App. 16a-17a, and *Firstar*, 253 F.3d at 991-92, with *Wachovia*, 388 F.3d at 419-21. Finally, the circuits conflict even as to underlying policy considerations—namely, the possibility of local bias against national banks, and the relevance of that fact in analyzing this aspect of diversity jurisdiction. Compare *Firstar*, 253 F.3d at 993, with *Wachovia*, 388 F.3d at 424-25. Simply put, these three courts have exhaustively considered the arguments for and against the competing interpretations of § 1348, and have reached differing conclusions as to each of these arguments. This

Court's review will have the benefit of these thorough analyses.[2]

II. THIS JURISDICTIONAL ISSUE IS OF NATIONAL IMPORTANCE.

That this case concerns the proper scope of federal diversity jurisdiction is further reason that certiorari is warranted. Because of the importance of jurisdictional issues, this Court repeatedly grants certiorari to address questions of federal ju-

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[2] Indeed, the circuit courts' clear division of authority and thorough discussion of the relevant arguments is bolstered by an even deeper nationwide division of authority among federal district courts. In published decisions alone—and there are multiple unpublished decisions as well—at least nine district courts in six circuits have gone the way of the Fifth and Seventh Circuits, and another five district courts in four circuits have reached the contrary result.

Compare Adams v. *Bank of Am., N.A.*, 317 F. Supp. 2d 935, 941-42 (S.D. Iowa 2004) (concluding that "located" does not include branch offices), *MBIA Ins. Corp.* v. *Royal Indem. Co.*, 294 F. Supp. 2d 606, 611 (D. Del. 2003), *Carl* v. *Republic Sec. Bank*, 282 F. Supp. 2d 1358, 1364 n.1 (S.D. Fla. 2003), *appeal dismissed*, No. 03-12239-JJ, 2003 WL 22172202 (11th Cir. Aug. 5, 2003), *Evergreen Forest Prods. of Ga., LLC* v. *Bank of Am., N.A.*, 262 F. Supp. 2d 1297, 1307 (M.D. Ala. 2003), *Pitts* v. *First Union Nat'l Bank*, 217 F. Supp. 2d 629, 631 (D. Md. 2002), *Bank One, N.A.* v. *Euro-Alamo Invs., Inc.*, 211 F. Supp. 2d 808, 810 (N.D. Tex. 2002), *Baker* v. *First Am. Nat'l Bank*, 111 F. Supp. 2d 799, 800 (W.D. La. 2000), *Financial Software Sys., Inc.* v. *First Union Nat'l Bank*, 84 F. Supp. 2d 594, 602 (E.D. Pa. 1999), *and Bank of Am., N.A.* v. *Johnson*, 186 F. Supp. 2d 1182, 1183 (W.D. Okla. 2001), *with First Union Corp.* v. *American Cas. Co. of Reading, Pa.*, 222 F. Supp. 2d 767, 769-70 (W.D.N.C. 2001) (reaching the opposite conclusion), *Frontier Ins. Co.* v. *MTN Owner Trust*, 111 F. Supp. 2d 376, 379-80 (S.D.N.Y. 2000), *Ferraiolo Constr., Inc* v. *Keybank, N.A.*, 978 F. Supp. 23 (D. Me. 1997), *Norwest Bank Mi ., N.A.* v. *Patton*, 924 F. Supp. 114, 115 (D. Colo. 1996), *Bank of New York* v. *Bank of Am.*, 861 F. Supp. 225, 231 (S.D.N.Y. 1994) *and Connecticut Nat'l Bank* v. *Iacano*, 785 F. Supp. 30, 33-34 (D.R.I. 1992). Among this latter group, some courts have even held that a bank is a citizen of any State in which it has a "substantial presence," even if it has no branch office. *E.g.*, *Frontier Ins. Co.*, 111 F. Supp. 2d at 380; *Bank of New York*, 861 F. Supp. at 231.

risdiction even absent any circuit split. *E.g.*, *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 806 (1976); *Hagans* v. *Levine*, 415 U.S. 528, 533 (1974); *Executive Jet Aviation, Inc.* v. *City of Cleveland, Ohio*, 409 U.S. 249, 252 (1972); *Bowen* v. *Johnston*, 306 U.S. 19, 22 (1939).

The reason for this is plain. Because "[f]ederal courts are courts of limited jurisdiction," *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), the evaluation of jurisdiction holds a privileged place in federal jurisprudence. This is the reason, for instance, that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). In this case, in fact, both the district court and the Fifth Circuit recognized the importance of the jurisdictional issue, as evidenced by their decisions to certify and take an interlocutory appeal, respectively. Pet. Supp. App. 27a-32a, 33a-34a.

For all of these reasons, a conflict concerning the scope of federal diversity jurisdiction cannot go unresolved. With few exceptions, federal jurisdiction is obligatory, both as to what it includes and what it excludes. Federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them," *Colorado River*, 424 U.S. at 817; and, conversely, they may not exercise jurisdiction that has not been conferred, *Bender*, 475 U.S. at 541. The conflict presented here means that some federal courts necessarily have run afoul of one of these two basic precepts, and will continue to do so absent this Court's intervention. Horton believes that courts in the Fifth, Seventh and Ninth Circuits (and numerous other district courts) are improperly exercising jurisdiction that they do not have. Bank One believes that courts applying the opposite rule—the one adopted by the Fourth Circuit, among other courts—are refusing to exercise jurisdiction that it is their duty to assume. Whichever party is correct, an intolerable error is repeatedly occurring which must be corrected.

Moreover, because the question presented concerns diversity jurisdiction, it further implicates the division of responsibility between state and federal courts, and the boundaries of federalism. The exercise of diversity jurisdiction, of course, divests state courts of authority that otherwise would be theirs. See generally *Younger* v. *Harris*, 401 U.S. 37, 43-45 (1971) (recognizing the need to afford comity to state courts). If, however, Congress has mandated diversity jurisdiction under § 1348 as the Fifth Circuit concluded, then the failure of courts in the Fourth Circuit and elsewhere to exercise that jurisdiction frustrates the congressional scheme, and denies litigants their right to a federal forum.

This issue is of additional significance because § 1348 applies to national banks. Absent review by this Court, an institution like Bank One, which has branches in 14 States around the country,[3] will be subject to a patchwork of state-federal jurisdiction. Different rules will apply to it in different States where it has branches—one rule for Texas and Illinois; another for West Virginia. The consequences are all the more severe for national banks that have branches in nearly every State. (Indeed, were the rule of the Fourth Circuit adopted nationwide, such institutions would effectively be denied access to federal courts based on diversity jurisdiction.) Every bank that has a presence in multiple States is now at the whim of a forum-shopping plaintiff, who can determine whether her suit will proceed in state or federal court based upon the local interpretation of § 1348.

III. THIS CASE PRESENTS A GOOD VEHICLE TO CONSIDER THIS ISSUE.

Finally, this case is a particularly appropriate vehicle to address § 1348. In the first place, both parties agree that the is-

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[3] *See* BankOne ATM/Branch Locator, *at* http://www.bankone.com/help/bolhelplocator.aspx (last visited Feb. 14, 2005). As a practical matter, that number is now 17: Branches in three additional States were added as a result of the merger with JPMorgan Chase.

sue is worthy of certiorari, and join in asking this Court to hear the case. Furthermore, the issue is cleanly presented, with no factual complexities to hinder this Court's evaluation of the underlying legal issue. Indeed, this is the rare case in which the case's interlocutory posture makes the case more appropriate for review, rather than less. Unlike the normal case—in which the prudential decision to await final judgment prevents the Court from unnecessarily adjudicating issues that may be rendered moot and permits the development of a full factual record—a final judgment in this case can add nothing to this Court's consideration of the jurisdictional issue. On the contrary, immediate determination of the jurisdictional issue is appropriate. As this Court recognized in the course of explaining why it would address an interlocutory issue of venue:

> This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality ... to determine now in which ... court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

Mercantile Nat'l Bank at Dallas v. *Langdeau*, 371 U.S. 555, 558 (1963); cf. *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 171 n.45 (1972) (recognizing that a "threshold issue of jurisdiction" is the type of "controlling question [which could] end all proceedings," that may be appropriate for interlocutory review on certiorari). There are no facts relevant to this jurisdictional issue yet to be developed. In sum, this case squarely presents an issue this Court should resolve now.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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